

can provide "cover for any collusive arrangement." *Id.* at p. 2. He concludes that the bits of information revealed during the course of an open auction forces any bidder with collusive intent to make its intentions public while the bidding is active, allowing competitors to adjust their strategy and, in all likelihood, preventing the collusive activity from being successful. *Id.* at p. 3. Furthermore, bid rigging and other forms of collusive bidding constitute *per se* violations of the Sherman Act, 15 U.S.C. § 1. See, e.g., *United States v. Flom*, 558 F.2d 1179, 1183 (5th Cir. 1977); *United States v. Finis P. Ernest, Inc.*, 509 F.2d 1256 (7th Cir.), cert. denied 423 U.S. 74, 893 (1975). The Commission should not be so quick to conclude that bidders will violate antitrust laws, particularly in so highly visible a process.

Another reason for doubting any significant probability of collusion in these circumstances is that for a cartel to be effective, it must be able to coordinate its activities and punish any violator,¹² which simply would not be possible under these circumstances. Accordingly, the possibility of collusion should not be dispositive of the choice of one form of auction over another.

In summary, both economic analysis and the objectives of the enabling legislation point to the same conclusion: Oral bid auctions are the best way to award new spectrum licenses.

¹²See Congressional Budget Office, *Auction of Radio Spectrum Licenses* 44 (March 1992).

B. Sealed Bid Auctions Will Not Achieve The Budget Act's Goals.

SBC agrees with the Commission's conclusions as to the disadvantages of a standard sealed bid auction. It is not certain that a sealed bid auction will award the spectrum to the party who values it the most. In a sealed bid auction, bidders must "shave" their bids ". . . below the maximum they are willing to pay in order to avoid paying more than necessary to win the auction." *NPRM* at para. 41; see generally *Kagel and Levin, supra, op. cit.* at p. 18; *Milgrom and Weber, infra, op. cit.* at n.13. Since sealed bid auction participants do not know precisely how much others have bid, it is possible that the bidder with the highest willingness to pay may not submit the highest sealed bid.¹³

This consequence undermines the entire reasoning behind the use of auctioning for use of public resources. If the entity which values the resource the most does not obtain the asset, the Commission cannot be sure that the most efficient use of the scarce resource will be made, defeating a key component of the former Communications Act and of the new legislation. See generally, T. J. Schroeffer, "Allocating Spectrum Through the Use of Auctions," 14 *Hastings Communications and Entertainment Law Journal* 35, 36 (Fall 1991). The only advantage of sealed bidding

¹³See Paul Milgrom and Robert Weber, "A Theory of Auction in Competitive Bidding," *Econometrica*, September 1982, 1089-1172; "Analysis and Recommendations for FCC PCS Spectrum Auctions," *PacTel Corporation White Paper*, December 13, 1993 (Hausman and Wittman).

over an oral auction appears to be the possibility of a diminished opportunity for collusion. Given the lack of significant probability of collusion in PCS auctions, coupled with the fact that oral bidding equalizes the knowledge base among participants, sealed bids offer no advantage which would support their use by the Commission for any type of spectrum allocation.

C. Combinatorial Bidding Does Not Meet Congressional Objectives.

SBC opposes the Commission's proposed combinatorial bidding mechanism for awarding any spectrum. It is especially opposed to its use, however, for awarding the 51 PCS MTA licenses on each of two 30 Mhz spectrum blocks ("Block A" and "Block B"). NPRM at para. 120. The Commission makes this proposal despite the clear weight of the evidence in favor of oral auctions, particularly for PCS. The proposed procedure, in addition to being subject to all of the theoretical disadvantages of sealed auctions, is anticompetitive and falls short of the basic statutory requirements for competitive bidding systems.

SBC is not opposed to the concept of aggregation of PCS licenses. Given the Commission's creation of both BTA and MTA licensing areas for PCS, each with disparate spectrum allocations, some aggregation of both spectrum and area served may enhance the development of competition. However, for the same reasons that a national license for PCS would not have been

in the public interest," allowing the initial licensing of MTAs to occur on an aggregated nationwide basis is not in the public interest. This proposal will stifle competition and have the effect of creating an undesirable monopoly.

1. Nationwide Combinatorial Bidding For PCS
Contravenes Section 309 of the Communications Act.

The Commission is directed to design a competitive bidding system which promotes the objectives of Section 309(j)(3) of the Act. These objectives include the development and rapid deployment of new technologies, products and services for the benefit of the public, promotion of economic opportunity and competition, and avoidance of excess concentration of licenses. Allowing 30 Mhz MTA licenses for PCS to be aggregated on a nationwide basis utterly fails to further those objectives. Ironically, while the Commission favors combinatorial bidding solely because it may "reduce the transaction costs of efficiently aggregating licenses," NPRM para. 57, the only use of the combinatorial bidding contemplated by the Commission appears to be the creation of a nationwide aggregation of MTA licenses. Yet it is precisely this kind of aggregation that Congress disapproved when it directed the Commission to develop auction methods that would "avoid excessive concentration of licenses." 47 U.S.C. 309. Nationwide aggregation of MTA licenses subverts

⁴See, e.g., Comments of Southwestern Bell Corporation, filed November 9, 1992, in GEN. Docket 90-314, In the Matter of Amendment of the Commission's Rules to Establish New Personal Communications Services, at pp. 20-24.

Congress' determination to encourage diverse participation and attention to regional differences and needs.

2. The Value Of Combined Service Areas Will Be Adequately Expressed Without Combinatorial Bidding.

The Commission erroneously assumes that "[b]idding on individual licenses, even sequentially, does not allow bidders to fully express the interdependence of license values and does not insure that groups of licenses are assigned to their highest valued use." NPRM at para. 57. However, allowing individual MTA bids on a geographically sequential basis, as advocated by SBC, does allow bidders to use information acquired during the auction process to reevaluate the total value they place on combinations of licenses. For example, if a bidder seeks to acquire several licenses and has won the first of several contiguous properties, the value he places on the next contiguous property may well increase to reflect the higher combined value of the two properties, and will be reflected in his bidding. Oral bidding, therefore, can adequately reflect the maximum value placed on individual and combined licensed areas while allowing the economic aggregation of markets.

3. If The Commission Employs Combinatorial Bidding, It Should Open The Sealed Nationwide Bids Before Conducting Oral Auctions.

The Commission contends that combinatorial sealed bidding avoids providing an undue information advantage to bidders for a group of licenses. The NPRM argues that announcing the oral results and then offering licenses in groups might allow

the group bidders to outbid the announced sum of the single licenses without permitting a counter-offer. NPRM at para. 58. SBC agrees that the Commission should not allow aggregated bids to be placed after the oral individual bids. But the Commission does not go far enough. If sealed bidding is used and nationwide aggregated bidding for MTA licenses is permitted,¹⁵ the Commission should require the sealed bids to be submitted in advance and opened prior to the oral bidding. Otherwise the entity or consortium that is placing the sealed bid has knowledge that the non-consortium members bidding on individual licenses do not have.

¹⁵If the Commission adopts a combinatorial bidding method, it should make clear what the winners of such bids have been awarded, e.g., in the case of a nationwide MTA bid for personal communications services, 51 individual licenses. At least two reasons clearly dictate this requirement, which appears to be the Commission's tentative purpose in any event. First, one must assume that the build-out requirement imposed by the Commission in its PCS Order apply to each MTA or BTA area. This assumption is warranted because the build-out requirements are designed to ensure that spectrum is not warehoused and that a broad segment of the public should have available these innovative services on a timely basis. If build-out requirements were imposed on a nationwide basis, it would be entirely possible that the winner of the nationwide license could meet those lenient standards by serving a fairly small portion of the country. Thus, a national license holder could simultaneously advertise itself as the only national provider while actually serving a relatively small portion of the geographic area of its combined licenses. This would be an extremely inefficient way to allocate spectrum.

Further, aggregating licenses to a single national license without insisting that the individuality of the license remains would not allow the individual MTA licenses to migrate into the hands of people who may value specific properties higher than the winner of the nationwide bid. Surely it is in the public's best interest for a provider to be able to sell an MTA license that it has no interest in serving or later finds it has no capability of serving.

Oral auctions proceed most effectively when all parties are well informed. Opening the sealed nationwide aggregated bids in advance provides all parties with the same information at the same time. Further, Congress expressed a strong preference for diversity of licensees. Section 309(j)(3)(B). To minimize excessive concentration of licenses, the Commission should either abandon combinatorial bidding or at least construct it so as to favor individual bids over aggregated ones.

If the individual bidders exceed the aggregated submission in the process outlined above, the public benefits in two ways: first, from the stimulated auction price which resulted from the free flow of aggregated value versus individual values; second, from the competition, diversity and innovation that is generated by the presence of multiple licensees. For similar reasons, SBC supports allowing the winners of individual MTA licenses to submit a best and final offer at the conclusion of the oral bidding if the sum of the initial oral MTA bids does not exceed the winning sealed aggregated bid.¹⁶

4. Nationwide Combinatorial Bidding Is Anti-Competitive.

A nationwide service area comprised of the 51 linked MTA licenses could prevent expeditious service deployment and

¹⁶As a corollary, SBC suggests that the Commission clarify that only the individual oral bid winners should be permitted to provide a second and final bid (the so-called "recourse" round) (The NPRM is not clear in this respect.) Winners of the individual oral auctions may not have paid their maximum price, and they may wish to increase their bids to defeat the nationwide aggregated bid. Accordingly, limiting participation to the oral bidders will make the recourse round far more effective.

certainly will not encourage competition and service diversity, contrary to the purposes of Section 309(j). Among more obvious results, this nationwide aggregation would likely result in a *de facto* technical standard supported by less technical diversification and experimentation than is desirable.

Cellular carriers that will compete with PCS providers acquired their licenses on the basis of the much smaller MSAs and RSAs. These areas were not capable of being linked nationally into a single service area when initially licensed. Coverage area is the single most critical selling point for wireless services, for obvious reasons. A company which holds a nationwide group of licenses could, unlike existing cellular operators, provide nationwide service (including single rate service packages that could not be matched by any other wireless provider) and eventually serve all mobile service customers on its own networks end-to-end.

By adopting the large MTAs for the 30 MHz PCS licenses, the Commission has already placed existing wireless providers, including cellular carriers, at a distinct competitive disadvantage. The Commission's goal in developing PCS could not have been to provide an insuperable advantage to PCS providers over all other wireless carriers. Thus, aggregating licenses nationwide would effectively deny PCS consumers the benefit of cellular companies' expertise in unfolding wireless services. Allowing nationwide aggregation of MTAs which themselves dwarf

the MSAs of cellular licensees only exacerbates that problem and should not be allowed.¹⁷

5. The Commission Should Place Restrictions
On AT&T/McCaw.

The pending merger of AT&T/McCaw and the unique dominant position that such an entity would acquire merit specific regulatory attention by the Commission in connection with PCS licensing in general and nationwide aggregated bidding in particular. If the merger is permitted to go through as proposed by AT&T and McCaw,¹⁸ AT&T/McCaw's unfair regulatory and competitive advantages would be overwhelming. Accordingly, SBC has previously urged the Commission to at the very least impose conditions¹⁹ that would help mitigate the anticompetitive effects

¹⁷Opposed as SBC is to nationwide aggregations of licenses, it abhors even more the notion of a single nationwide PCS provider. Accordingly, if the Commission is determined to allow nationwide aggregation of MTA licenses, then it should allow aggregation on both the A and B bands. The marketing advantage to a single entity of being able to claim that it is the sole licensee with a nationwide scope would be virtually insurmountable.

¹⁸On November 1, 1993, SBC filed with the Commission its *Petition to Impose Conditions or, in the Alternative, to Deny*, in File No. ENF 93-44; *In the Matter of American Telephone and Telegraph Company and Craig O. McCaw, Applications to Transfer Control of Licenses Held by Subsidiaries and Affiliates of McCaw Cellular Communications, Inc.* ("SBC Petition").

¹⁹These conditions include, but are not limited to the following: each AT&T wireless service provider must offer to all interexchange carriers exchange access and exchange services for such access on an unbundled and nondiscriminatory basis; AT&T wireless service providers may not bundle local and long distance wireless service; structural separation of cellular operations from other lines of business; equal access to interconnection; nondiscrimination provisions regarding technical information, interconnection, new services, and equipment; and no sharing of information between the entity's interexchange and wireless

of this merger. Certainly one additional condition that must be imposed in the PCS license context is that while the merger is pending, both AT&T and McCaw be treated as the owner of McCaw's cellular properties for purposes of the spectrum attribution rules surrounding qualification for PCS licenses. AT&T, McCaw and the proposed AT&T/McCaw entity should all be precluded from participating in any fashion in any nationwide aggregated bidding. SBC has already detailed the numerous anticompetitive effects that would result from any entity acquiring a nationwide set of PCS licenses. Those effects are multiplied many times over if that entity were to be affiliated in any respect with AT&T/McCaw with its overwhelming size and unique integrated control over manufacturing, long distance and wireless services on a nationwide basis.

Part of the Commission's mission is to foster competition and prevent any particular carrier from being able to utilize an unfair competitive advantage. Allowing AT&T/McCaw to extend its already overextended grasp into the PCS marketplace will neither foster competition nor level the competitive playing field.

6. Oral Bidding Will Allow The Economic Aggregation Of Licenses.

SBC contends that the Commission should abandon the combinatorial bidding method because this mechanism may lower

personnel regarding proprietary customer information about other interexchange companies or wireless service providers' subscribers or networks. See SBC Petition at pp. 73-88.

revenues to the treasury and disadvantage many small firms. Oral auctions would still allow firms to purchase a group of spectrum licenses and avoid the disadvantages of combinatorial bidding. Indeed, a company which seeks to acquire several BTA licenses in a region may well bid more to obtain the second and subsequent licenses in an oral auction, because the value of subsequent licenses is enhanced by acquiring the prior ones. This will ensure that the maximum value is placed on license areas while allowing the economic aggregation of markets. Combining this kind of aggregation in bidding with the superior knowledge held by the sealed bidder sets up the possibility that the extensive auction process created by the Commission will result in only two nationwide licenses, two licenses for the set-aside groups and some miscellaneous 10 MHz licensees.²⁰ Clearly, this result will

²⁰Indeed, the aggregation may be even more intense. The Commission seeks comment on whether it should permit combinatorial bidding (1) to aggregate two or three 10 MHz spectrum blocks for PCS, (2) to aggregate across both geographic areas and spectrum blocks (e.g., a bid for all BTA licenses on two 10 MHz spectrum blocks within each MTA) and (3) to aggregate both designated entity blocks. SBC opposes combinatorial bidding for any type of aggregation, preferring a more open system which facilitates buyer exchange of information. See § IV.C supra. Finally, SBC urges the Commission not to use combinatorial bidding to aggregate across spectrum bands, particularly the four 10 MHz blocks. This would eliminate cellular and local exchange companies from PCS, contrary to the Commission's apparent intent in creating these small blocks, which are the LEC/cellular company's only option of obtaining any additional spectrum. As SBC pointed out in its last PCS ex parte, these entities may find such spectrum blocks extremely useful for applications like wireless drop. Even if the Commission found such aggregation (presumably to create regional clusters) minimally attractive, such benefit would not outweigh the significant disadvantage to those who wish to complete a geographic block. The mechanics of such combinatorial bidding, moreover, do not meet the Commission's key criterion of

not achieve the intended diversity of providers and choice of auction results contemplated either by Congress or the Commission. This scenario is less likely to stimulate build-out and differentiation of service options than a more numerous array of providers.

D. Performance Requirements Must Be Strictly Enforced To Avoid Unjust Enrichment And Warehousing.

As discussed above, SBC strongly supports a strict application of performance requirements to avoid spectrum warehousing. The legislation itself instructs the FCC to be vigilant against warehousing and to use performance requirements to meet this goal and to promote investment in and rapid deployment of new services. Section 309(j)(4)(B). The build-out requirements for personal communications service licensees, for example, were disappointingly lenient, especially when compared with the more strenuous objectives imposed upon cellular providers.²¹ On the other hand, such performance requirements necessarily must vary from service to service. For example, should a telephone company apply for a spectrum award for wireless drops, performance requirements necessarily would differ from those appropriate for a more retail-oriented service, like fax store and forward.

simplicity and ease of administration. NPRM at para. 18.

²¹SBC supported a 75% geographic buildout requirement in the first 3 - 5 years after licensing PCS. The Commission's PCS Orders opted for 33% population buildout in 5 years, 66% in 7 years at 90% in 10 years. Cellular providers on the other hand, are required to be able to serve 75% of the population within 3 years.

E. Prohibition Of Collusion Should Not Cause The Commission To Complicate The Bidding Process.

As SBC explains thoroughly above, the auction process need not be complicated by artificial mechanisms designed or constructed to minimize the possibility of collusion. Rather, SBC supports the exclusive use of oral auctions as the Commission's principal tool in preventing unwanted collusion. Certain types of concerted activity which might otherwise be considered a form of "collusion" may actually be beneficial to the public interest, at least in the context of PCS. Certainly, negotiations for spectrum use to minimize mutually exclusive applications must be preferable to government allocation in every instance. Because bid rigging and other undesirable collusive activity constitute violations of highly punitive antitrust laws, the Commission need not adopt significant collusion deterrence measures of its own.

However, the Commission should make clear that it understands the difference between an improper bidding strategy and bidding consortia. Simply put, it should not be abhorrent to the Commission that certain parties combine financial resources for the purpose of obtaining a license or a common set of licenses. On the other hand, the Commission should reject (as a court would be likely to do) preliminary (and private) agreements which divide up markets by agreeing on which entities will bid on what licenses. Such agreements are obviously contrary to the Congressional goal of achieving diversified service provision and the corollary of producing auction revenues for the government.

**F. Application, Bidding, And Licensing Requirements
Proposed By The Commission Generally Are Acceptable.**

SBC applauds the Commission's conservation of administrative resources by reviewing only "short form" applications prior to the auction. Given the limited information required by the short form application, the "letter perfect" standard should be no serious impediment. SBC also approves in general the proposal of the NPRM to use a public notice process for apprising the public of the dates for auctions and the qualified bidders.

SBC suggests some minor modifications, however, to maximize the time-frames regarding PCS for the benefit of those bidders. A 90 day notice of the date on which an auction will be held is essential for PCS²² and probably the least amount of time which would be fruitful. Ninety (90) days is a minimal period in which to evaluate PCS property values, because in a field of unknown market demand the time to value the property is far more critical than knowledge of who is the competition. For most spectrum services, indeed, it is likely that the participants already have some knowledge of who is in the game. Thus, SBC suggests that the Commission permit interested bidders 45 days from the issuance of the Public Notice to indicate their interest in participating in a specific license. The Commission should issue a list of the interested bidders within 15 additional days,

²²On the other hand, 90 days is much too long for microwave applications, if the Commission adopts bidding for those links. The FCC should defer notice requirements for auctions of non-PCS spectrum to later proceedings, on a service-by-service basis.

leaving a 30 day window in which both the date of auction and the competing bidders is known.

SBC urges the Commission to confirm its decision to retain up-front payments or deposits in the event that an auction winner is found ineligible or unqualified.²³ In the application process, the Commission should require verified certifications that all application requirements have been met. Thus, the up-front payment which accompanies the application can be analogized to a good faith bond. Retention of the up-front payment when an applicant's qualifications are found to be lacking can be considered an administrative fine for breach of the bond. Imposition of this potential forfeiture will exert necessary market discipline. The specific authorization by Congress to the FCC to impose payments to prevent unjust enrichment from trafficking also justifies the forfeitures. 47 U.S.C. § 309(j)(4)(B); see also, H.L. Rep. 103-111 at 257.

²³SBC supports the Commission's proposal to hold a new auction if the winner fails to qualify. NPRM at para. 106. Awarding the spectrum to the second highest bidder is not an adequate substitute. The qualification process is likely to occur after all other auctions are completed for that band or type of service. Thus the market dynamics necessarily will be different than during the original auction and might well invite new interested parties or cause others to choose not to participate. Consequently, a second auction open to full participation is appropriate.

V. AUCTION DESIGN FOR PCS.

A. Sequence Of Bidding.

SBC favors auctioning of licenses one band at a time. Thus, all of the "Band A" licenses for PCS services to be awarded on an MTA basis would be auctioned before the "B Band." Rather than moving from largest market to smallest,² the auction should proceed geographically across the country (either from west to east or east to west). Moving geographically allows parties placing individual bids who are interested in acquiring licenses for regional clusters to judge a license's market value based upon whether they won the bid for preceding contiguous markets. Regional clusters can take on a value of their own if this method is used, which should maximize bid prices and assure that the spectrum is awarded to the carrier(s) which place the greatest value on it. Moving from the highest population areas to the lowest, proposed by the Commission (*id.*), does not allow this value calculus. Under the Commission's proposal, the areas of greatest interest to providers will be auctioned with the least amount of information available, which is in no one's best interest.

B. Auctions For Bands D Through G.

While nationwide aggregation of BTAs is neither proposed by the Commission nor does it appear beneficial to any public interest, allowing aggregated bidding on BTA's to approximate an MTA appears to have merit. The Commission has

²NPRM at para. 125.

created an imbalance in the size of license areas by setting up both BTAs and MTAs. Carriers may find it expeditious, in attempting to compete with the MTA licensees, to aggregate BTAs in order to achieve an effective service area comparable to their competitors. Should the Commission consider adoption of such aggregated bidding, SBC proposes the following auction design. In a manner similar to the nationwide combinatorial bidding for MTA's, all sealed bids for the aggregated BTAs (aggregated to the MTA in which they are placed) should be placed prior to opening of the oral auctions. Similarly, these aggregated bids should be opened before conducting the oral auction. At the conclusion of the oral auctions of all the individual BTAs associated with a single MTA, the individual BTA bids should be added and compared to the highest sealed bid. If the sum of the individual BTA bids is higher than the highest aggregated bid for the MTA, licenses should be awarded to the individual BTA oral bidders. Otherwise, the winning oral bidder should be permitted to submit a sealed best and final bid.

C. Payment Methods.

SBC has no quarrel with the alternative payment methods suggested by the Commission for the designated entities, nor does SBC object to the requirement that non-designated entities provide a lump sum payment promptly after winning the auction.²⁵

²⁵The requirement that the money be deposited in 24 to 48 hours seems unnecessarily costly, however. NPRM at para. 106. Two to five days is short enough to require pre-bid financing and long enough to allow recourse to external markets. If the dollars are not produced, the spectrum should be awarded to the

Two aspects of the payment discussion, however, raise concerns for SBC.

SBC strongly opposes the use of a combined initial payment and royalties in spectrum auctions, even where the services are "highly risky." NPRM at para. 70. First of all, the Commission offers no definition of "highly risky", and it is entirely unclear what is meant by the term. Royalties merely shift the reward of taking a risk from the entrepreneur, who has undertaken to secure financing and provide the up-front payments just to participate, to the government, which has taken no risk at all. Moreover, comparison of bids which contain royalties to those which do not, or even those which combine royalties with initial payments, would be so difficult as to invite interminable administrative delay, especially as the courts review each decision made by the Commission. See NPRM at para. 70. One commentator pointed out that comparing royalties might even require a miniature comparative hearing just to determine the winning bid, because determining which bidder was highest will require an assessment of accuracy of demand estimates, expansion plans, quality of revenue assumption, etc.²⁶ Use of royalties as a payment option also would give licensees an incentive to defer expansion of service capacity until after the royalty period is ended so as to avoid paying the full royalty. This result is

second highest bidder.

²⁶See *Petition for Rulemaking by BellSouth, supra.*, at p. 17, n.33.

clearly antithetical to the auction's objective of encouraging service delivery. On the other hand, installment payments seem to serve roughly the same purpose without any of these complications.

While SBC does not object to the lump sum payment requirement nor to the proposed up-front payment, one refinement should be adopted to simplify the process and avoid unnecessary expense for auction participants. Parties should be allowed to submit their up-front payment in the form of Treasury bills with a face amount of the required payment. If the bidder is not successful, the Treasury bills would be returned. The bidder retains the benefit of the interest accruing on the Treasury bill and the Commission has not created any accounting problems. This method is obviously superior to the two suggested by the Commission. NPRM at para. 104, n. 100.

D. The Commission Should Establish A Maximum Up-front Payment, Which Is An Adequate Deposit Amount.

SBC concurs that no minimum bid should be required for spectrum auctions generally nor for PCS auctions specifically. The public interest benefits in facilitating rapid provision of new services such as PCS are clear. The possibility of an increase in auction revenues, on the other hand, by requiring a minimum bid, is uncertain. Moreover, increasing auction revenue in and of itself is not a factor that the Commission is allowed to use to justify any aspect of auction design. 47 U.S.C. § 309(j)(7)(B). In any event, since new information tends to raise the value estimates of bidders who would otherwise bid low,

the price paid at an auction will likely increase as buyers release new information. Geographic clusters of licenses orally auctioned in sequence would achieve this result.

Moreover, the Commission's tentative decision to require a reasonable deposit will act as a kind of minimum price, as will the Congressional Budget Office's tentative calculation of the value of a PCS license.²⁷ In summary, a minimum bid merely increases the price of spectrum and distorts the market. Since the minimum price would serve as a governmental handicap to providing service for all, and since the purpose of a competitive bidding process is to encourage efficient use of spectrum, a minimum price, however low, appears to be inconsistent with the statutory goals.

The Commission expresses some concern that its 2 cents per pop per megahertz calculation of an up-front payment might be inadequate. NPRM at para. 102. The resulting numbers are not inconsequential. For example, a national license will require an up-front payment of approximately 200 million dollars. When one understands that this is merely the price for expressing an interest in the market, the Commission should be assured that the up-front payment is more than adequate to accomplish its purpose "to ensure that only serious, qualified bidders participate." NPRM at para. 103.

²⁷Auctioning by geographic area but completing one band before auctioning the next band's licenses would appear to meet the objections made by BellSouth in its Petition for Rulemaking, p. 15, filed September 14, 1993.

SBC encourages the Commission to create a maximum combined up-front payment. Of course, a natural limit to the up-front payment that could be required for any party can be calculated, at least for personal communications services auctions. Because the Commission proposes to limit any one licensee to 40 MHz of spectrum, the natural limit on an up-front payment is approximately 200 million dollars (assuming that the Commission adopts its proposal of charging two cents per pop per megahertz for any application). SBC proposes that the maximum up-front payment required of oral non-aggregated bidders on PCS spectrum should be 25% of this natural limit, or 50 million dollars. This proposal has the advantage of eliminating uncertainty due to the timing of the auctions and of the refunds for unsuccessful bidders. A party who intends to bid on a number of MTA licenses could simply deposit the maximum up-front payment in the form of Treasury bills on a one-time basis. Such a one-time deposit eliminates for the Commission complex bookkeeping requirements which would result from a bid-by-bid minimum. Applicants would find this streamlined calculation simple (and nearly risk free, due to the Treasury bill option) which could improve the chances of more diverse bidders participating. For a sealed aggregated nationwide bid, on the other hand, the total up-front payment of approximately \$200 million should be submitted, because the bidder is in fact submitting a bid in each and every MTA auction which will occur.

E. The Commission's Treatment Of Designated Entities Could Be Improved.

SBC does not object to the Commission's proposal to set aside spectrum for designated entities. Two modifications, however, would improve the process.² First, the Commission should clarify that it will permit financial backing for designated entities to be made by others who might not qualify as such entities themselves. Second, it should place only the most minimal of restrictions on transferability of spectrum licenses granted to such entities. With regard to the former point, simple control rather than a 50.1 percentage equity ownership of the women and minority businesses should be the standard. Creative financing options such as equity infusions and preferential stock options should enhance these groups' opportunities to participate in the PCS market. Likewise, minimal transfer limitations on the spectrum awarded to

²Although SBC does not quarrel with the Commission's laudable public interest of encouraging minority participation, one might wonder whether it has done these groups a service by creating a set-aside only for wideband PCS and not for narrowband. Set-asides would seem more particularly appropriate for applications which, while perhaps less lucrative in total dollars, nonetheless might provide more than adequate cash flows and probably require smaller initial capital outlays. These presumptions, when combined with a set-aside of spectrum (which should dampen auction prices in any event), might be a more realistic way of creating economic opportunity for the designated entities. Thus, the Commission might contemplate withdrawing the set-aside of spectrum for wideband PCS and instead apply it to narrowband, retaining the installment payments and other options for a broadband PCS.

designated entities is essential to preserve economic viability."

VI. CONCLUSION

What started as a simple proposition, that one should pay for private use of a public resource, has become an extremely complicated process. Because of the uncertainty of the burgeoning wireless market, the Commission's (and industry's) lack of experience with auction matters and the demanding timetable imposed by Congress for auction implementation, SBC urges the Commission to simplify its proposals wherever possible. Essentially, the Commission should focus on only two objectives: the speedy delivery of services which are in the public interest and the imposition of a fair obligation on all participants to return to the public a portion of the value derived from use of

"SBC's definition of a "minimal" transfer restriction is that the licensee be required to retain the license until after a construction permit has been granted. This process was used successfully in the cellular licensing area. While some accuse the cellular licensing process of generating some unjust enrichment, this criticism is more properly directed to the lottery process than to the transfer restrictions. The up-front fees which will be required for participation in spectrum auctions should tend to minimize the unjust enrichment which might result.

what is, at its heart, a national treasure. SBC believes that the preceding comments are consistent with these objectives.

Respectfully submitted,

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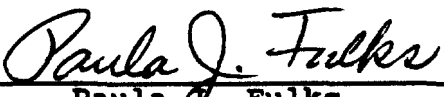
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November 10, 1993

CERTIFICATE OF SERVICE

I, Paula J Fulks, hereby certify that copies of the foregoing Initial Comments of Southwestern Bell Corporation have been postage prepaid, on the parties listed on the attached.



Paula J. Fulks

November 10, 1993